EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-246

Supreme Court, U.S.
FILED
AUG 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE L.E. MYERS COMPANY, HIGH VOLTAGE DIVISION, and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Petitioners,

vs.

WILLIAM E. BROCK, SECRETARY OF LABOR UNITES STATES DEPARTMENT OF LABOR,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John W. Beatty
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8200

Counsel for Petitioner

Of Counsel:
John M. Kunst, Jr.
Gary E. Becker
DINSMORE & SHOHL

APPENDIX

	Page
Opinion of the Court of Appeal for the Sixth Circuit.....	1
Opinion of the Occupational Safety and Health Review Commission.....	32
Opinion of the Administrative Law Judge.....	78
Order of Judgment from the Court of Appeals for the Sixth Circuit..	105
Pertinent Provisions of: Occupational Safety and Health Act of 1970, 29 U.S.C. § 614 et seq.	
§5(a)(2), 29 U.S.C. § 654(a)(2)...	107
29 U.S.C. § 666(b).....	108
29 U.S.C. § 666(c).....	108
§17(k), 29 U.S.C. § 666(k).....	109
29 C.F.R. § 1926.28(a).....	110
29 C.F.R. § 1926.105(a).....	110
29 C.F.R. § 2200.73(a).....	110

No. 86-3215

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM E. BROCK, Secretary of Labor,

Petitioner

-v-

THE L. E. MYERS COMPANY, HIGH VOLTAGE DIVISION, and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION TO REVIEW AN ORDER
OF THE OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

Decided and Filed May 13, 1987

Before: ENGLE and GUY, Circuit Judges; and PECK, Senior Circuit Judge.

GUY, Circuit Judge. The Secretary of Labor petitions this court for review of an order of the Occupational Safety and

Health Review Commission reversing the administrative law judge's (ALJ) decision, which had upheld citations issued against L. E. Myers Company (Myers). The Secretary contends that the Commission's decision is not supported by substantial evidence and did not adequately articulate its reasons for failing to credit the findings of the ALJ. We agree and hereby reverse.

I.

This action arises from an inspection conducted by a compliance officer of the Occupational Safety and Health Administration (OSHA) following the electrocution death of one of Myers' employees. Following the inspection, OSHA issued several citations charging Myers with both serious and non-serious violations of the Occupational Safety and Health Act of 1970 (the Act). 29 U.S.C. § 651 et seq. However,

the Secretary appeals only the Commission's ruling with respect to the citation for "serious"[1/] violation of 29 C.F.R. § 1926.28(a), and we will confine our discussion to that issue only. Section 1926.28(a) provides:

> § 1926.28 Personal protective equipment.
>
> (a) The employer is responsible for requiring the wearing of appropriate personal protective

---

1/ A serious violation is deemed to exist "if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

> equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

The citation alleged that Myers had committed a serious violation by exposing employees working without safety belts or other fall protection to a potential fall of 75 feet.

The investigation ensued as the result of an accident in which one employee was killed and another was seriously injured at a construction project near Cincinnati operated by High Voltage Systems, a wholly-owned division of Myers which constructs and installs electrical transmission and distribution equipment. The project required Myers' employees to install rubber covering as an insulation on a 13.2 kilovolt energized electrical

wire in a congested construction area where Emery Industries, which had contracted with Myers to perform the insulation work, was building an addition to a boiler house. The electrical lines ran a distance of 85 feet between a terminal pole and a tower located atop the boiler house. The terminal pole was about 47 feet high, the roof of the boiler house was about 60 feet from ground level, and the top of the tower was about 80 feet from the ground.

Although the preferred method of performing this operation called for deadening the high-voltage power lines, Emery refused to do so, whereupon James Kevelder, Myers' district manager for the Cincinnati area, consulted with Robert Sayre, a Myers' foreman, about alternate methods of performing the job. It was finally decided to attempt the job from the roof of the boiler house building by

standing a ladder on the roof against the electrical tower supporting the high-voltage wires and having a man mount the ladder and slide the rubber hose down onto the wires. No mention was made of the use of any specific protective equipment during this decision.

The foreman, Sayre, contacted James Carmac, a journeyman lineman, and Russell Miller, an apprentice lineman, to perform the job. James Carmac testified before the ALJ that he had asked Sayre if they needed to bring any tools or belts with them, and Sayre said, "No, you don't need nothing. All you need is a ladder that is in a shed there at the substantion." App. at 207. The work commenced when Sayre, wearing no protective equipment other than rubber gloves, mounted the 28 foot extension ladder on the east side of the tower, and covered most of the energized areas with rubber blankets. He

then took the rubber hose which was handed up to him by Carmac, who was standing on a lower rung of the ladder, and began to slip it over the wires. This procedure involved laying a section of hose over the top channel of the tower structure, reaching under the channel and over a diagonal brace, and feeding the interlocking hose onto the line. As the weight of the hose increased, Sayre decided to balance the load by installing hose onto the opposite side. He accordingly dismounted and the ladder was moved. Although it appears that the ladder may have been "tied-off" while Sayre worked from it, Carmac testified that when it was moved, the rope was slack and it no longer appeared to be secured.

At that point, Miller mounted the ladder to continue the procedure from the west side of the tower as Sayre had

previously been doing. Although Miller was wearing both rubber gloves as well as sleeves,[2/] none of the three men were wearing a safety belt or any other fall protection equipment. A bystander, the manager of another electrical construction firm working at the Emery site, testified at the hearing that observing Miller carrying out this procedure was "like watching a guy struggling on a tight rope, and we at that point were debating whether we should holler at the guy and tell him to get off the thing." Shortly after he began performing the work, Miller, without explanation or warning, fell foward and struck an uncovered energized "pothead" or terminus for the power lines. He was instantly electrocuted,

---

2/ Rubber sleeves fit over the worker's arms and extend all the way to the shoulder area.

and continued falling until he struck the ground some 85 feet below. Carmac, standing on a lower ladder rung, fell backward onto the roof, suffering broken ribs and other injuries. Sayre, who had been observing from a corner of the roof, was unharmed.

Following investigation of the accident, Myers determined that Sayre was subject to discipline for failing to require the use of any fall protection equipment, such as safety belts and lanyards. Use of such equipment on the Emery project was mandated by Myers own written safety booklet which is distributed to all supervisory personnel. Sayre was placed on a two-week suspension without pay, from which he never returned.[3/]

3/ Sayre was not present to testify at the hearing and his current whereabouts are apparently unknown.

II.

Myers contested the citation for violation of 29 C.F.R. § 1926.28(a) on the ground that the violation was not chargeable to the company because it had a safety rule requiring the use of safety belts while working at elevated locations and, therefore, the failure to use belts in this instance was unforseeable employee misconduct.

The evidence adduced at the hearing revealed a safety program at Myers which looked good on paper but was routinely disregarded in practice in the Cincinnati district. The formal safety program consisted of: (1) distribution of safety manuals to employees and supervisors, who were required to sign and return a receipt for the manuals; (2) regular safety "tailgate" meetings which were to be conducted by foremen at the worksite; (3) the

filing of reports on such meetings with the district manager (here Kevelder); (4) individual pre-job discussions of safety matters; (5) workside visits by a Myers Safety Supervisor, headquartered in Chicago; and (6) a progressive system of discipline for safety infractions, normally implemented by the district manager. Myers could produce no records showing receipt by either Carmac or Miller of their basic safety booklets nor for the manuals required for supervisory personnel, such as Sayre and Kevelder. No records were produced of <u>any</u> tailgate meetings conducted by Sayre, and Carmac reported that he could not remember when a safety meeting had last been held. Kevelder's secretary, Nancy Maher, testified that, prior to the accident, Sayre had not filed any safety reports. Following Miller's death, Kenneth

Kesmeyer, HSVS's manager out of Toledo, demanded copies of Cincinnati's safety reports. Maher testified that Sayre repaired to a backroom with some pens, a calendar, and a copy of Myers "Tailgate Safety Meeting Guides" and prepared several reports at once.

Kevelder testified that, as district manager, he did not get "actively involved" in the safety program and that it was very seldom necessary to have safety meetings unless something was "really out of the ordinary," although the company's Safety Supervisor, Robert Grandt, testified that it was the district managers who were responsible for training and enforcement of safety matters within their districts. Kevelder further admitted that there had been no specific discussion of safety matters prior to the Emery job at issue, mainly because it would be "insulting [Sayre's] intelli-

gence" to remind him to take normal safety precautions. However, as Carmac's testimony revealed, Sayre specifically stated that no safety belts would be needed on the job and, in deed, he himself did not have his belt on nor did he tie-off while on the ladder as protection against a potentional fall. Finally, OSHA's compliance officer testified that "The written program is a fairly effective and thorough program. It is not administered in that manner; therefore, I rated the program as being ineffective."

The ALJ concluded that Myers "has made an effort to institute and implement a safety program of sorts. While this safety program appears on its face to be a workable program, the circumstances surrounding the actions of foreman Sayre on the day of the accident and prior thereto cast serious doubt that the program was

effective with respect to the crews he supervised." He credited testimony showing that Sayre did not conduct tailgate safety meetings as mandated and that he "may have falsified reports in this regard." He also relied on Carmac's testimony that Sayre told him belts would not be needed as evidence of the fact that Myers' safety program "was not effectively communicated or enforced." Finally, he credited testimony by Kevelder's secretary and a union representative to the effect that, shortly after the accident, Kevelder stated that he felt good linemen did not need safety belts because they just "get in the way." App. at 166.

In reversing the findings of the ALJ, the Commission concluded that Myers' safety program was both adequate and effectively communicated to its employees,

relying primarily on testimony relative to the operation of the program as envisioned by the Safety Director's Office. They cited the compliance officer's testimony for the proposition that Myers' employee training program was not deficient, ignoring the rest of his testimony to the effect that the manner in which it was actually carried out rendered it ineffectual. They further found that "Sayre was a good supervisor" despite the fact that there was testimony presented regarding two incidents on prior jobs which Sayre had supervised wherein Sayre's judgment and attention to safety matters was called into question. No mention was made of the conflicting testimony specifically credited by the ALJ. The Commission concluded that the Secretary failed to sustain his burden of proving a violation of § 1926.28(a) and vacated the citation.

III.

The Secretary raises two issues on appeal:

1) whether the Commission erred in placing the burden of proof on the Secretary to establish that the employee misconduct was unforseeable to the employer, and

2) whether the Commission's decision is supported by substantial evidence where it failed to articulate any reasons for discrediting evidence relied on by the ALJ and ignored evidence relative to the actual enforcement and communication of Myers' safety program to its employees.

We address these issues seriatim.

A. The Burden of Proof

The Occupational Safety and Health Act's stated purpose is to provide "so far as possible every working man and woman in the Nation safe and healthful

working conditions . . . ." Whirlpool Corp. v. Marshall, 445 U.S. 1, 12 (1980). Its purpose is neither punitive nor compensatory, but rather forward-looking; i.e, to prevent the first accident. Mineral Industries & Heavy Construction Group, v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981). To implement the statutory purpose, Congress imposed dual obligations on employers to comply both with a "general duty clause" requiring that the employer free the work-place of all recognized hazards, 29 U.S.C. § 654(a)(1), and a "special duty clause" which requires compliance with mandatory occupational safety and health standards issued by the Secretary, 29 U.S.C. § 654(a)(2). In this case, Myers is charged with a breach of the special duty clause by its violation of the standard set forth at 29 C.F.R. § 1926.28(a). This

standard mandates that an employer shall require the wearing of appropriate personal protective equipment in all situations where an employee is both exposed to a hazardous condition and the need for such protective equipment is indicated elsewhere in part 1926. Although the current version of the standard uses the disjunctive "or" with respect to these separate clauses, its original version used the conjunctive "and" to indicate that both conditions must be satisfied. The Commission held that the change to "or" was invalidly promulgated by the Secretary and required reinstatement of the prior interpretation mandating that both conditions be met, and the Secretary expressly declined to challenge that ruling on appeal. Therefore, our analysis will proceed by taking as a given that a violation of

both parts of § 1926.28(a) must be proven.[4/]

Although Myers does not contest the facts that neither the foreman, Sayre, nor Carmac and Miller were wearing safety belts, that such belts would have been appropriate fall protection on the Emery job, that risk of a fall was a recognized hazard attendant upon a job performed from a ladder over 75 feet above ground level,

---

4/ This court has held that "§ 1926.28(a) requires an employer to require the wearing of appopriate safety equipment by his employees whenever a reasonably prudent employer, concerned with the safety of his employees, would recognize the existence of a hazardous condition and protect against that hazard by the means specified in the citation." Ray Evers Welding v. Occupational Safety, 625 F.2d 726, 731 (6th Cir. 1980). However, that case arose prior to thc Commission's invalidation of the disjunctive version of the regulation.

and that § 1926.105(a)[5] "indicates the need" for protective equipment where the "workplace is more than 25 feet above the ground,"[6] Myers nevertheless argues

---

5/ § 1906.105 Safety nets.

> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary forms, safety lines, or safety belts is impractical.

Although this standard explicitly refers only to "Safety nets," the Commission as well as several courts of appeals have interpreted this standard to include safety belts as well as the other listed items as appropriate means of fall protection. See Southern Colorado Prestress Co. v. OSHRC, 586 F.2d 142, 1350 (10th Cir. 1978); Brennan v. Southern Contractors Service, 492 F.2d 498 (5th Cir. 1974).

6/ Myers puts forth an argument in this regard that we must address. They contend that § 1926.105(a) should be read only to require an employer to utilize either a safety net or any other enumerated safety device -- including a "safety belt" or a "ladder." Therefore, they argue, since Myers undisputedly provided a ladder upon which the involved employees could stand, the ladder itself was sufficient fall protection and no other safety equipment was mandated.

that these facts are insufficient to prove the Secretary's case. They contend that, since it is clear that Congress did not intend employers to be insurers against all accidents, but only those which are preventable, that when an employer alleges the existence of a comprehensive safety program which renders noncompliance unforseeable, the Secretary carries the burden of proving the insufficiency of that program. We disagree.

6/ cont'd

The Commission itself has acknowledged that § 105(a) "is not satisfied simply by the use of one of the devices listed in that section without reard to whether such use provided adequate fall protection to employees." National Indus. Conductors, Inc., 90 O.S.H. Cas. (BNA) 1871, 1872 (Rev. Comm'n 1981). See also Brock v. L. R. Willson & Sons, Inc., 773 F.2d 1377, 1384 (D.C. Cir. 1985) (device used must be capable of providing protection against the type of hazard to which employees are exposed). Moreover, in its brief to the Commission, Myers specifically conceded that safety belts should have been used on this project.

As Myers points out, there is a split among the circuits with respect to this question. Several circuits have held that an allegation of unforseeable employee misconduct constitutes an affirmative defense to be pleaded and proved by the employer. See, e.g., Forging Industry Ass'n v. Secretary of Labor, 773 F.2d 1436, 1450 (4th Cir. 1985) (en banc) (unforseeable employee misconduct constitutes an affirmative defense); Daniel International Corp. v. OSHRC, 683 F.2d 361, 363 (11th Cir. 1982) (same); H. B. Zachry Co. v. OSHRC, 638 F.2d 812, 818-19 (5th Cir. 1981) (same); General Dynamics Corp. v. OSHRC, 599 F.2d 453, 458 (1st Cir. 1979) (employer may defend by showing it took all necessary precautions to prevent occurrence of violation); Danco Construction Co. v. OSHRC, 586 F.2d 1243, 1246 (8th Cir. 1978) (employer bears

burden of establishing affirmative defense of unforseeable employee misconduct). Other circuits place the burden of disproving unforseeable employee misconduct on the Secretary. See Capital Electric Line Builder of Kansas v. Marshall, 678 F.2d 128 (10th Cir. 1982); Pennsylvania Power and Light v. OSHRC, 737 F.2d 350, 357 (3d Cir. 1984) (Secretary bears the burden of proving that supervisor's failure to comply with standard was forseeable).[7/] We are persuaded that the ap-

---

7/ Despite the Pennsylvania Power & Light court's holding, it also stated that "[i]n cases where the Secretary proves that a company supervisor had knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions." Moreover, we observe that the court's conclusion was predicated on the presence of an adequate safety program and the unblemished safety record of the involved supervisor.

cont'd

propriate resolution of this question is to regard a claim of unforseeable employee

---

7/ cont'd
We also observe that the Tenth Circuit has itself issued a conflicting case in Austin Bldg. Co. v. OSHRC, 647 F.2d 1063 (10th Cir. 1981). In Austin, the court held:

> The Secretary has the burden of showing that the employer knew or, with the exercise of reasonable diligence, could have known of the likelihood of the noncomplying condition or practice. The employer may defend by showing that the violation was an unforseeable occurrence. Evidence that the employer effectively communicated and enforced safety policies to protect against the hazard permits an inference that the employer justifiably relied on its employees to comply with the applicable safety rules and that violations of these safety policies were not forseeable or preventable.

Id. at 1067-68 (emphasis added). See generally Annotation, Employee Misconduct as Defense to Citation, Issued Pursuant to O.S.H. Act, Arising Out of Alleged Violation of Standards Resulting in Death or Personal Injury of Employee, 49 A.L.R. Fed. 395 (1982).

misconduct as an affirmative defense to be proved by the employer after the Secretary has made out a prima facie case of a violation of the Act.

In cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer's safety policy. National Realty and Construction Co., Inc. v. OSHRC, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973). See also Donovan v. Capital City Excavating Co., Inc., 712 F.2d 1008, 1010 (6th Cir. 1983) (actions of supervision are imputed to the company). However, the proper focus in employee misconduct cases is on the effectiveness of the employer's implementation of its safety program and not on whether the employee misconduct is that of a fore-

man as opposed to an employee. Congress has specifically imposed on the employer the "responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this Act remains with the employers." S. Rep. 1282, 91st Cong. 2d Sess. 10-11 (1970). The statutory duty to assure compliance with standards issued under the Act includes the obligation to prevent hazardous noncomplying conduct by employees. "[A]n instance of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous character, at the moment of its occurrence. Conceivably, such conduct might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees." National Realty, 489 F.2d at 1267 n.37. Since the Act itself places upon the employer the

responsibility of taking all reasonable steps to eradicate preventable hazards, "including imposing work rules, communicating the rules to employees, and providing training, supervision and disciplinary action designated to enforce the rules," Forging Industries, 773 F.2d at 1450, the Secretary makes out a prima facie case of the employer's awareness of a potentially preventable hazard upon the introduction of proof of the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions. See Brennan v. OSHRC, 511 F.2d 1139, 1143 n.5 (9th Cir. 1975) ("Proof of an employer's failure to provide guardrails, safety equipment, instructions, or the like, would establish a prima facie case of an employer's knowl- edge of its own acts of omission."); Danco Construction Co. v. OSHRC, 586 F.2d at 1246 (employer may not "fail to prop-

erly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous working practices.").

Thereafter, an employer may defend the citation on the ground that, due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employee(s) in violating that policy was idiosyncratic and unforseeable. By its nature, information with respect to the implementation of its written safety program will be in the hands of the employer, and it is not unduly burdensome to require it to come forward with such evidence. If the employer's evidence preponderates, it has successfully established the defense of unforseeable employee misconduct. We emphasize that the employer who wishes to rely on the presence of an effective safety program to establish that it could

not reasonably have foreseen the aberrant behavior of its employees must demonstrate that program's effectiveness in practice as well as in theory.

B. Substantiality of the Evidence

Factual findings of the Commission are conclusive if supported by substantial evidence in the record as a whole. 29 U.S.C. § 660(a). However, when the Commission reverses the factual findings of the ALJ, who had the unique opportunity of observing the demeanor of the witnesses and accepting or rejecting their testimony based on those observations, the Commission must articulate reasons for its failure to discredit those findings. Citizens State Bank v. FDIC, 718 F.2d 1440, 1444 (8th Cir. 1983); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1264 (4th Cir. 1974) (administrative agency must explain grounds for rejection of ALJ's disposition).

In the case at bar, it is clear that the Commission chose to accept Myers' evidence as to the adequacy of its written safety program while selectively ignoring testimony, credited by the ALJ, which showed that the program in practice, at least in Kevelder's district, and more specifically with respect to Sayre personally, was not only ignored, but actively disregarded.[8/] The Commission gave no reasons for its failure to accept the factual findings made by the ALJ. Under these circumstances, we do not find the Commission's conclusion supported by

---

8/ See, e.g., testimony establishing that, when asked if belts or other special equipment would be necessary, Sayre said "no". Further, Carmac testified that after he saw what the job entailed, he "would have put a lanyard on if I had one." He had intentionally left his safety equipment at his other job site in reliance on Sayre's assurance that it would not be necessary.

substantial evidence and it will therefore be REVERSED.

PETITION GRANTED.

REVIEW COMMISSION DECISION

SECRETARY OF LABOR,

Complainant,

-v-

THE L. E. MYERS COMPANY, HIGH VOLTAGE SYSTEMS DIVISION,

Respondent,

OSAHRC Docket No. 82-1137, Jan. 16, 1986.

William S. Kloepfer, U.S. Department of Labor, Cleveland, Ohio, for complainant.

Kent W. Seifried, Cincinnati, Ohio, for respondent.

Review Commission Judge Edwin g. Salyers.

Before Buckley, Chairman; Rader and Wall, Commissioners.

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U.S.C. §661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651-678 ("the Act"). The Commission is an adjudicatory agency,

independent of the Department of Labor and the Occupational Safety and Health Administration. It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the Act and has no regulatory functions. See section 10(c) of the Act, 29 U.S.C. §659(c).

This case arises out of an accident in which one employee of Respondent L. E. Myers Company was electrocuted and another injured when they fell from a ladder. As a result of his investigation of the accident, the Secretary failed to prove any violation, and that portion of the judge's decision is not before us. However, Judge Salyers did not find that L. E. Myers violated 29 C.F.R. §1925.28(a) because its employees were not using safety belts and lanyards to

protect against a fall. [1/] The judge also found L. E. Myers in violation of 29 C.F.R. §1926.450(a)(7) for failing to position the ladder at a proper angle,[2/] and 29 C.F.R. §1926.450(a)(6) for failing to keep the area at the base of

---

1/ 29 C.F.R. §1926.28(a) provides as follows: The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

2/ 29 C.F.R. §1926.450(a)(7) requires that Portable ladders shall be used at such a pitch that the horizontal distance from the top support to the foot of the ladder is about one-quarter of the working length of the ladder (the length along the ladder between the foot and the top support). Ladders shall not be used in a horizontal position as platforms, runways, or scaffolds.

the ladder clear.[3/] Review was directed on whether 29 C.F.R. §1926.28(a) was validly promulgated and whether the judge erred in finding Respondent L. E. Myers in violation of §§1926.28(a), 1926.450(a)(6) and 1926.450(a)(7).

L. E. Myers is an electrical contractor who constructs and installs electrical transmission and distribution equipment. Myers was engaged by Emery Industries to place protective rubber hosing over certain electrical power lines at Emery's plant at St. Bernard, Ohio.[4/] Myers put one of its foremen,

---

3/ Section 1926.450(a)(6) requires that "[p]ortable ladder feet shall be placed on a substantial base, and the area around the top and bottom of the ladder shall be kept clear."

4/ Emery wanted to protect the power lines from any accidental contact by a crane doing construction work at the plant.

Robert Sayre, in charge of this job. Sayre, an experienced lineman himself, was assisted by James Carmac, a journeyman lineman, and Russell Miller, an apprentice.

The lines to be covered with rubber hosing ran from the top of a tower on the roof of Emery's boiler house downward to a pole and cross arm approximately 85 feet away. The roof of the boiler house was 60 feet above the ground and the tower on top of the roof was 20 feet high. The cross arm on the pole below was 47 feet above the ground.

Foreman Sayre and Carmac and Miller first attempted to use a 55-foot bucket truck to put the hoses on the lines at that height, and then push them uphill towards the tower. However, this method proved infeasible because of the friction on the wire and the weight of the hoses.

Sayre then consulted with his supervisor, James Kevelder, who was Myers' district manager for the Cincinnati area. They determined that the work could be done from a ladder on the boilerhouse roof placed against the tower, which would allow the employees to place the hoses on the power lines at the top of the tower and slide them in a downward direction.

On the day of the accident, Sayre, Carmac and Miller began to do the job from the roof. Rubber blankets were placed over all electrical equipment and the employees wore protective rubber gloves and sleeves. None wore safety belts or lanyards on the day of the accident. The ladder was placed on the east side of the tower and secured. Foremen Sayre and Carmac then went up on the ladder, with Sayre ascending first.

Miller, who stood on the roof below, began handing sections of hosing to Carmac. In turn, Carmac handed the pieces to Sayre, who placed them on the easternmost power line. When the weight of the hosing on the east line began to unbalance the pole and cross arm at the lower end, Sayre and Carmac came down off the ladder, and the crew moved the ladder to the west side of the tower to begin placing the hosing on the west power line.5/

The roof area near the base of the west side of the tow was obstructed by an air conditioner box, with a pipe extending outward from the box toward the tower. In the same area there were

---

5/ The weight on the east and west lines had to be balanced to prevent the pole at the tower level from twisting.

also angle iron braces for the tower itself. In order to avoid the air conditioner box and the angle iron bracing, the employees placed the base of the ladder on the far side of the air conditioner box so that the air conditioner box was between the ladder and the tower. The top of the ladder was placed against a horizontal cross member of the tower that was 18 feet above the roof, and Carmac placed a piece of wood under one of the legs of the ladder to compensate for unevenness in the surface of the roof.

Once the ladder was repositioned and made secure, the employees recommended installing the hosing on the power line. This time Miller went up the ladder to place the hosing on the power line, followed by Carmac, while Sayre remained on the roof to hand up the sections of

hosing. For reasons unclear in the record, Miller fell off the ladder and struck and energized "pothead jumper" (a connection between energized conductors on either side of the tower) some four to six feet below where he had been standing on the ladder. Miller was electrocuted when he struck the pothead jumper, and he then fell to the ground below. Carmac was injured when he jumped off the ladder onto the roof to avoid the electric flash that resulted when Miller struck the pothead jumper. There was no evidence that Miller's fall was caused by the ladder tipping or sliding.

Alleged Violation of 29 C.F.R. §1926.28(a)

The Secretary charged Myers with a serious violation of 29 C.F.R. §1926.28(a) for its failure to require its employees at the work site to wear safety belts and lanyards. Myers

counters thlt it may not properly be cited under §1926.28(a) because the standard was invalidly promulgated and is therefore void. Myers also contends that the failure of its employees to wear safety belts and lanyards on the Emery job was a direct violation of Myers' published and enforced safety rules, was unknown to Myers, and could not have been reasonably anticipated. We deal with these contentions in order.

(a) Validity and Interpretation of 1926.28(a)

This standard was originally promulgated under the Contract Work Hours and Safety Standards Act, commonly known as the Construction Safety Act. Section 107 of that statute, 40 U.S.C. §333, authorizes the Secretary to prescribe safety and health standards for federal or federally-assisted construction contracts.

The standard, then codified as 29 C.F.R. §1518.28(a), required that personal protective equipment be worn "in all operations where there is an exposure to hazardous conditions and where this part [1518] indicates the need for using such equipment to reduce the hazards to employees." (Emphasis added). On May 29, 1971, the standards in Part 1518 were adopted as standards under the Occupational Safety and Health Act, 36 Fed. Reg. 10469, and on December 30, 1971, §28(a) was redesignated as 29 C.F.R. §1926.28(a). 36 Fed. Reg. 25232 (1971). This adoption of the standards at Part 1518 was accomplished pursuant to section 6(a) of the Occupational Safety and Health Act, 29 U.S.C. §655(a), which allowed the Secretary for the first two years under the Act to adopt any existing federal or national consensus safety or

health standard without regard for the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 551 et seq, or the promulgation procedures outlined in §6(b) of the OSH Act, 29 U.S.C. §655(b).

When §28(a) was republished in the January 1, 1972, revised Code of Federal Regulations the wording of the standard was still exactly the same as the old Construction Safety Act standard at 29 C.F.R. 1518.28(a). Subsequently, on December 16, 1972, without any notice and comment rulemaking procedure, the Secretary "revised" a number of the standards at Part 1926, including §1926.28(a). The revised §1926.28 (a) read:

> The employer is responsible for requiring the wearing of appropriate personal protective

> equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees. (Emphasis added.)

37 Fed. Reg. 27510 (1972). this remains the language of the current section 1926.28(a) under which Myers has been cited.

Myers contends that the change of the word "and" to the word "or" was a substantive change in the standard, which is impermissible without notice and comment rulemaking. The Secretary, on the other hand, contends that the revision of §28(a) was only to "improve its usefulness" and to "correct a number of typographical and clerical errors," 37 Fed. Reg. 27503 (1972), and did not materially affect the duties of employees

under the standard.

In its present form the standard is clearly in the disjunctive; that is, an employer must require the wearing of personal protective equipment either where there is an exposure to a hazardous condition or where Part 1926 elsewhere affirmatively indicates the need for using such equipment. But if the word "and" in the original standard was conjunctive, then it imposed a burden on employers to require the wearing of personal protective equipment only if there existed an exposure to a hazardous condition and also if Part 1926 elsewhere affirmatively indicated the need for the use of such equipment.

The Commission and the courts have held that in adopting consensus standards under §6(a) of the OSH Act the Secretary "was not empowered to make substantive changes from the source standard." Senco

Products, Inc. 82 OSAHRC 59/E9, 10 BNA OSHC 2091, 2095, 1982 CCH OSHD ¶26.304, p. 33,271 (No. 79-3291, 1982). See also Diebold, Inc. v. Marshall, 585 F.2d 1327, 1332 & n.6 [6 OSHC 2002, 2004] (6th Cir. 19789). Thus, the question before us is, first, whether "and" in the standard as originally promulgated was conjunctive, and, if so, whether the substantive change of the word "and" to "or" in the standard substantively affected the duties of employers. With respect to §1926.28(a), this is not the first time that the question has been raised. Indeed, the history of §28(a) is particularly troublesome. Previous cases have resulted in inconclusive holdings, or have avoided the issue altogether.

Previous Review Commission cases reflect a sharp division over whether the word "and" in the original standard was

in the conjunctive or the disjunctive. See, e.g., Hoffman Construction Co., 75 OSAHRC 31/E12, 2 BNA OSHC 1523, 1974-75 CCH OSHD ¶19,275 (No. 644, 1975), rev'd, 546 F.2d 281 [4 OSHC 1813] (9th Cir. 1976); Carpenter Riggings & Contracting Corp. 75 OSAHRC 32/D13, 2 BNA OSHC 1544, 1974-75 CCH OSHD ¶19,252 (No. 1399, 1975); General Bronze Architectural Products, 75 OSAHRC 62/C14, 4 BNA OSHC 1244, 1974-75 CCH OSHD ¶19,690 (No. 2031, 1975); United Engineers & Contractors, Inc., 75 OSAHRC 69/A2, 4 BNA OSHC 1313, 1974-75 CCH OSHD ¶19,780 (No. 2414, 1975); Isseks Brothers, Inc., 76 OSAHRC 8/B9, 3 BNA OSHC 1964, 1975-75 CCH OSHD ¶20,361 (No. 6415, 1975). However, it seems clear to us that the use of the word "and" in the standards as originally

promulgated was in the conjunctive,[6/]

6/ It is axiomatic that "and" normally has a conjunctive meaning. United States v. Castellana, 433 F.Supp. 1309 (M.D. Fla. 1977). See De Sylva v. Ballentine, 351 U.S. 570, 573-74 (1956). When "and" is used to join two clauses, it normally indicates that both must be read together in determining the rights or obligations of those affected by the statute or regulation in question. See, Areizaga v. Quern, 442 F.Supp. 168 (N.D. Ill. 1977). aff'd, 590 F.2d 226 (7th Cir. 1978); United States v. Gera, 279 F.Supp 731 (W.D. pa. 1968), rev'd and rem'd on other grounds, 409 F.2d 117 (3d Cir. 1969). Conversely, "or" is normally a disjunctive rather than a conjunctive; it separates alternative or fully independent provisions. United States Customs Service v. FLRA, 739 F.2d 829 (2d Cir. 1984); United States v. Garcia, 718 F.2d 1528, 1532-33 (11th Cir. 1983), aff'd 105 S.Ct. 479 (1984); George Hyman Const. Co. v. OSHRC, 582 F.2d 834, 840 n.10 [6 OSHC 1855, 1959] (4th Cir. 1978); Piet v. United States, 176 F.Supp. 576, 583 (S.D. Cal. 1959), aff'd 283 F.2d 693 (9th Cir. 1960). As a disjunctive, therefore, "or" is not freely interchangeable with "and." Illinois v. ICC, 687 F.2d 1047, 1054 (7th Cir. 1982); United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir 1979), cert. denied, 446 U. S. 954

cont'd

and that a violation could be established only upon proof of both (a) an exposure to hazardous condition requiring the use

---

cont'd 6/
(1960). We recognize, of course, that there may be circumstances in which strict adherence to the usual definitions of "and" and "or" would frustrate the drafter's intent or create an inconsistency with other provisions. United States v. Fisk, 70 U.S. 445 (186); Moore, supra; In re Rice, 165 F.2d 617, 619 n. 3 (D.C. Cir. 1947). However, there is no history of section 1926.28(a) or other material to indicate the Secretary's intent when he promulgated the standard under the Construction Safety Act and adopted it under the OSH Act. We therefore cannot conclude that the Secretary intended "and" to be read disjunctively. See, Alabama v. Marshall, 626 F.2d 366 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981) (interpretation of a statute must accord with its plain language if a contrary intent is not clearly and distinctly shown). Nor is there any conflict with other standards arising from the term "and" to necessitate construing it in a disjunctive manner. The circumstances presented here, therefore, do not justify construing "and" in a manner contrary to its usual meaning.

and that a violation could be established only upon proof of both (a) an exposure to hazardous condition requiring the use of personal protective equipment, and (2) the failure to use this equipment when the need for its use is indicated elsewhere in Part 1926. Our view is buttressed by the holding of the Ninth Circuit in Hoffman Construction Co., supra, 546 F.2d at 283 [4 OSHC at 1814] where the court held that:

> Liability under 29 C.F.R. §1926[.28(a)] as then written required proof of three elements: (1) that the employer did not require the wearing of protective equipment; (2) that there was exposure to hazardous conditions; and (3) that [some other section of] Part 1926 of the regulations indicated a need for protective equipment.

It is equally clear that the revised §28(a) is in the disjunctive. Under the standard as presently worded, a violation may be establihed by proof of either a hazard or the failure to use personal protective equipment when the need for its use is indicated elsewhere in Part 1926. With the revision, a violation can be established by simply showing a failure to require the wearing of "appropriate" personal protective equipment where there is employee exposure to a hazardous condition, but also proof that need for a specific item of protective equipment was indicated in another section of Part 1926. Thus, the revision of §28(a) obviously deleted an element of proof necesary to establish a violation.

Previous Review Commission cases have, again, sharply divided over whether this

deletion of an element of proof, and the corresponding obligation of employers under the Act, was substantive.[7/] See, e.g, Carpenter Rigging & Contracting Corp., supra; Island Steel & Welding, Ltd., 75 OSAHRC 51/A2, 3 BNA OSHC 1101, 1974-75 CCH OSHD ¶19,545 (No. 2931, 1975); Isseks Brothers, Inc., supra; Sweetman Construction Co., 76 OSAHRC 35/A2, 3 BNA OSHC 2056, 1975-76 CCH OSHD ¶20,466 (No. 3750, 1976); Schiavone Construction Co., 77 OSAHRC 78/A2, 5 BNA

7/ Under the standard as originally promulgated the Secretary had the duty to specify elsewhere in his standards the circumstances where personal protective equipment must be used under §1926(a). By contrast, under the standard in its present form the employer is liable for evaluating whether the conditions in its workplace necessitate the use of personal protective equipment without the benefit of guidance from the Secretary as provided under the original version of the standard.

OSHC 1385, 1977); cf. Eichleay Corp., 75 OSAHRC 35/B6, 2 BNA OSHC 1635, 1974-75 CCH OSHD ¶19,324 (No. 2610, 1975); Dic-Underhill, 75 OSAHRC 35/F10, 2 BNA OSHC 1651, 1974-75 CCH OSHD ¶19,328 (No. 2232, 1975); General Bronze Architectural Products, supra; B & B Insulation, Inc., 77 OSAHRC 49/A2, 5 BNA OSHC 1265, 1977-78 CCH OSHD ¶21,747 (No. 9985, 1977), rev'd, 583 F.2d 1364 [6 OSHC 2062] (5th Cir. 1978). The decisions of the respective courts of appeals unfortunately provide no guidance in resolving this question. Thus far the courts of appeals have declined to rule on the direct issue of whether the revision to §28(a) was substantive. See, Austin Building Co. v. OSHRC, 647 F.2d 1063, 1067 [9 OSHC 1718, 1721] (10th Cir. 1981); Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 730 n.5 [8 OSHC 1271, 1273] (6th Cir. 1980); B & B

Insulation, Inc., supra, 583 F.2d at 1368 [6 OSHC at 2064]; Hoffman Construction Co., supra, 54f F.2d at 283 n.5 [4 OSHC 1816.]

Judge Salyers below ruled that the revision of §28(a) from "and" to "or" was not substantive, following the Commission's decision in S & H Riggers and Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶23, 48 (No. 15855, 1979), rev'd on other grounds, 659 F.2d 1273 [10 OSHC] 5th Cir. 1981). In S & H Riggers the Commission rejected an identical challenge to §28(a) on the belief that "we have consistently held that the change was not substantive." 7 BNA OSHC at 1263. The majority in S & H Riggers thought that the earlier Commission decisions in Carpenter Rigging & Contracting Corp., supra, Isseks Brothers, Inc., supra, Island Steel and

Welding, Ltd., supra, and Eichleay Corp., supra, established that the change in §1926.28(a) was not substantive. Analysis of those cases, however, reveals that a majority of the Commissions never could agree on the proper interpretation of §28(a) either before or after the amendment. Indeed, as Commissioner Barnako correctly pointed out in his separate opinion in S & H Riggers, the cases relied on in S & H Riggers actually reflect inconsistent and sharply divided views as to the proper interpretaion of §28(a).[8/]

8/ In Carpenter Rigging & Contracting Corp., supra, Commissioner Clearly interpreted the original standard as being in the disjunctive and therefore concluded that the change from "and" to "or" was not substantive. Commissioner Moran took the opposite view. Commissioner Van Namee expressly did "not join in" Commissioner Clearly's interpretation of the standard, but voted to affirm

Cont'd

8/ the citation on other grounds. 2 OSHC at 1549. In Eichleay Corp. and in Island Steel and Welding, Ltd. the majority held only that the standard meant the same after the amendment as it did before the amendment. Commissioner Clearly so held because he believed that the "and" in the original standard was in the disjunctive, so that the change to "or" was not substantive. Commissioner Van Namee had stated earlier in Hoffman Constr. Co., supra, 3 BNA OSHC at 1102, 1974-75 CCH OSHD at p. 23, 335. Commissioner Moran consistently asserted that the change in the standard was substantive. Similarly, in Isseks Brothers, Inc., supra, Commissioner Clearly adhered to his previous interpretations of the standard. Although Commissioner Barnako voted to affirm the citation, he expressly disassociated himself from Commissioner Clearly's "discussion of the vagueness and validity" of § 28(a). 3 BNA OSHA at 1967, 1975-76 CCH OSHD at p. 24,288. Commissioner Moran again dissented on the grounds that the amendment to the standard was invalid. Thus, there has never been a clear majority holding as to either the interpretation or the validity of § 28(a). Indeed, this divergence of views prompted the Fifth Circuit to comment that "each decision by the Commission has produced as many conflicting interpreters as there were participating Commissioners, both under the old regulation and the new." B & B Insulation, Inc., supra, 583 F.2d at 1368 [6 OSHC at 2064].

the revision of §28(a) was not substantive, we overrule that decision. We conclude, rather, that the revision or amendment of §28(a) constituted a substantive change, not an administrative one.[9/]

[2] When the Secretary desires to make such a substantive change in a standard,

---

9/ We reject the Secretary's contention that the Commission should defer to the statement accompanying the revision of the standards that no substantive changes were made. As a subsequent, noncontemporaneous document, the revision and its preamble cannot be relied on to establish the meaning the Secretary intended when he originally promulgated section 1926.28(a) under the Occupational Safety and Health Act. Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965); United States v. Price, 361 U.S. 304, 313 (1960). In any event, the Secretary's characterization of his rulemaking actions is not binding on the Commission. See Marhsall v. Huffhines Steel Co., 488 F. Supp. 995 [7 OSHC 1910] (N.D. Tex. 1979), aff'd memo., 645 F.2d 288 [9 OSHC 1762] (5th Cir. 1981), and cases cited therein.

he must provide notice of the contemplated change to the public and allow the opportunity to submit written objections thereto and to participate in a public hearing thereon. 5 U.S.C. § 553; 29 U.S.C. § 655(b).[10/] Those procedures were not followed in amending

---

10/ We do not view the notice and comment requirements of 5 U.S.C. § 553 as meaningless technicalities to be disregarded when it is inconvenient to follow these procedures. Section 553 was enacted to give the public an opportunity to participate in the rulemaking process. Section 553 also contemplates that the agency promulgating the rule (or amendment) will use this procedure to educate itself before establishing rules and procedures which have a substantial impact on those regulated. See Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3rd Cir. 1969). This principle of fundamental fairness was emphasized by the Supreme Court in N.L.R.B. v. Wyman Gordon Company, 394 U.S. 759, 764 (1969), wherein the Court observed that the rulemaking provisions of section 553 "were designed to assure fairness and mature consideration of the rules of general application."

29 C.F.R. § 1926.28(a). Section 28(a) is therefore invalid in its modified form because it was not properly promulgated. Senco Products, Inc., supra; Florida Peach Growers Association, Inc. v. United States Department of Labor, 489 F.2d 120 (5th Cir. 1974). Since amendment of § 28(a) was invalid, it did not repeal the original standard. Frost v. Corporation Commission, 278 U.S. 515, 525-527 (1929); United States v. Tufti, 542 F.2d 1046 (9th Cir. 1976); Conlon v. Adamski, 77 F.2d 397 (D.C. Cir. 1935). We therefore conclude that the original version of § 1926.28(a) remains in effect and that to establish a violation of the Secretary must prove (1) exposure to a hazardous condition; (2) that some other section of Part 1926 indicates a need for the use of particular protective equipment in the

circumstances presented; and that (3) the employer failed to require the use of the equipment. Hoffman Construction Co., supra, 546 F.2d at 283 [4 OSHC 1814].

(b) Proof Of A Violation

In the present case the Secretary proved the first element necessary to establish a violation. The facts plainly demonstrate that the three Myers' employees were exposed to the hazard of a fall warranting the use of safety belts. Indeed, Myers concedes this in its brief on review.

The second part of the Secretary's burden under § 1926.28(s) requires him to prove that some other section of Part 1926 indicates the need for the particular personal protective equipment under the circumstances of this

case.[11/] By "indicates the need" we mean that the other section indicates that a particular form of personal protective equipment is a practical and an appropriate means of protection against a specified hazard. We do not mean that the other section necessarily requires the use of the particular equipment, but that it cites the equipment as among the satisfactory means of protecting against a described hazard

---

11/ We do not say, at this point, that the Secretary must specify in the citation itself the conjunctive section Part 1926 that "indicates the need" for personal protective equipment under the particular circumstances, although that seems to us to be the better approach. We only reiterate the due process requirement that at some point in the proceedings the respondent must have fair notice of the conjunctive section upon which the Secretary relies. In the present case we find that Myers had fair notice of the charge of failure to use safety belts to abate the hazard of a fall exceeding twenty-five feet.

so as to put an employer on notice that a particular type of personal protective equipment is appropriate in a given case. The Secretary has alleged, and we agree, that § 1926.105(a) "indicates the need" for safety belts where the "workplace is more than twenty-five feet above the ground." The record in this case clearly establishes that Myers' employees were working "more than twenty-five feet above the ground" and were exposed to a fall hazard.12/

12/ Section 1926.105(a) states as follows:
Safety nets shall be provided when workplaces are more than twenty-five feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

If the issue of the interpretation of this language were one of first impression, Commissioner Rader would conclude that this standard does not indicate a need for the use of personal

Finally, under the clear wording of the standard, the Secretary must prove that the employer failed to "requir[e] the wearing of" the prescribed safety equipment under the circumstances

---

cont'd
12/ protective equipment as fall protection. Rather, in Commissioner Rader's view, section 1926.105(a) speaks only to safety nets, and under the plain wording of the standard, safety nets are called for only when the other specified means of fall protection, including safety belts and safety lines, cannot feasibly or practicably be used. Commissioner Rader recognizes, however, that the courts and the Commission have interpreted section 1926.105(a) otherwise, and have held as the majority states here, that the standard for safety belts as an appropriate means of fall protection See, Southern Colorado Prestress Co. v. OSHRC, 586 F.2d 1342, 1350. [6 OSHC 2032, 2037] 10th Cir. (1978); Brennan v. Southern Contractors Service, 492 F.2d 498 [1 OSHC 1648] (5th Cir. 1974) Sierra Constr. Corp., 78 OSAHRC 2/E6, 6 BNA OSHC, 1978 CCH OSHD ¶22,506 [No. 13638, 1978] of the controlling case law, Commissioner Rader joins in the majority's conclusion that section 1926.105 indicates a need for using safety belts in the circumstances of this case.

specified. We find here that Myers did require its employees to use safety belts and lanyards under the conditions cited. The record shows that Myers' safety rules specifically address the appropriate use of safety belts and require employees to use safety belts when "working at elevated locations on poles, towers or other structures." Each supervisor is given a copy of Myers' safety manual containing these rules, must sign an acknowledgement of receipt, and is expected to follow and enforce the rules. Myers' safety supervisors visit the various worksites to insure that safety directives are received, understood and followed. The company's safety program is enforced through a progressive system of discipline consisting of verbal and written reprimands, demotion to a lower

classification, suspension from duties, and discharge. At the hearing the compliance officer acknowledged that the company's procedures for belts and ladders set forth in the safety rules and manual were appropriate, and that he did not consider Myers' employee training to be deficient. Myers' evidence concerning the communication of its rule regarding safety belts for all employees, including foreman, established that Sayre received the same training afforded all employees.

Moreover, Myers had no reason to suspect that Sayre's crew was likely to perform work in violation of its safety rules. Sayre was a good supervisor who in the past had never been known to engage in or supervise any activity during which he or his crew failed to use safety belts when they were necessary. We find no evidence in the record before

us that Robert Sayre's conduct here was reasonably foreseeable to or preventable by Myers. When Myers became aware of his violation, it took decisive action. After the company determined that Sayre had failed to require the use of safety belts on September 17, 1982, he was given a two-week disciplinary suspension with the expectation that he would not return to work.

[3] Based on this evidence, we conclude that the Secretary failed to sustain his burden of proving a violation of section 5(a)(2) of the Act. See Pennsylvania Power & Light Co. v. OSHRC, 737 F.2d 350 [11 OSHC 1985] (erd Cir. 1984); Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564, 571 [3 OSHC 2060, 2065] (5th Cir. 1976); H. E. Wiese, Inc., 82 OSAHRC 18/A2, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD ¶ 25,985, pp. 32,613-14 (Nos. 78-204 & 78-204, 1982), aff'd, No.

82-4202, (th Cir. Apr. 27, 1983) (unpublished). As the Ninth Circuit stated in Brennan v. OSHRC (Alsea Lumber Co.), 511 F.2d 1139, 1144 [2 OSHC 1646, 1651] (9th Cir. 1975), "Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least knowingly acquiesced in, that violation." Since the Secretary did not make such a showing here, we vacate the citation alleging noncompliance with 29 C.F.R. § 1926.28(a).

Alleged Violation of
29 C.F.R. § 1926.450(a)(7)

Section 1926.450(a)(7) requires that the pitch of a portable ladder be "about" one-to-four. In concluding that Myers had violated this standard, Judge Salyers found that the base of the 18 foot ladder upon which the employees were working was placed 9 feet 8 inches from the tower. However, it is not at all clear from the

evidence in the record that this distance is correct. Myers contends that the distance between the base of the tower and the base of the ladder was not that great, and from our reiew of the photographic evidence we are inclined to agree. Moreover, it appears that the air conditioning box, the pipe, and the angle iron bracing precluded placing the ladder anywhere other than on the far side of the air conditioning box. The ladder could not be placed between the box and the tower because the space was clearly too narrow to allow the ladder to be safely pitched against the tower. The ladder would also have been obstructed by the pipe extending from the box if Myers had attempted to place the ladder on the tower side of the air conditioner box. From our review of the evidence it appears that Myers' employees had no alternative but to place the ladder on the far side of the

air conditioner box, when working on the west side of the tower.

Section 1926.450(a)(7) does not require that the horizontal distance to the base of a portable ladder must be precisely one-fourth of the working length of the ladder but, rather, requires only that the ratio between the horizontal distance and the length of the ladder be "about" one-to-four. The standard, therefore, permits an employer to deviate from a strict one-to-four ratio but does not indicate the precise degree of deviation permitted. In interpreting a standard that uses terms which are relative rather than absolute, the Commission must consider objective factors that may give guidance to the meaning of the standard. See Austin Bridge Co., 85 OSAHRC ___/___, 12 BNA OSHC 1181, 1985 CCH OSHD ¶27,169 (No. 81-1049, 1985), petition for review filed, No. 85-4190 (5th Cir. Mar. 21, 1985).

These factors should obviously include the purpose of the standard, to the extent that purpose can be discerned. Cf. F. L. Heughes & Co., 83 OSAHRC 31/A2, 11 BNA OSHC 1391, 1983 CCH OSHD ¶26,520 (No. 14519, 1983) (standard allowing guardrail to be placed at "approximately" a 42-inch height does not permit the employer to position the guardrail at a height that defeats the purpose of a guardrail). The record here does not indicate the purpose of the pitch requirement of the standard. We may reasonably conclude, however, that the standard is intended to insure that the angle at which a portable ladder is placed is neither too great nor too shallow to permit an employee to climb the ladder without losing his balance or causing the ladder to tip or fall. The judge here found, and the Secretary does not dispute, that the ladder had been properly secured and was stable.

Photographs taken shortly after the accident show that the ladder had remained in place against the tower. Thus, the ladder did not move while the employees were working from it, and it remained in position even after Miller fell and Carmac jumpted from it. Therefore, it is clear that the angle at which the ladder had been placed did not cause the ladder itself to be incapable of safely supporting the employees. Since the record fails to explain what may have caused Miller to fall, it would be purely speculative to conclude that the angle of the ladder exposed Myers' employees to injury.

[4] In conclusion, we find that the pitch of the ladder was sufficiently within the standard's relative requirement that the angle be "about" one-to-four, and that the Secretary failed to demonstrate that any discrepancy between a precise

one-to-four pitch and the slope of Myers' ladder was excessive in light of the totality of the circumstances here.[13/]

Alleged Violation of
29 C.F.R. § 1926.450(a)(6)

The Secretary alleged that there were pieces of wood and metal on the roof near the base of the ladder, and cited Myers for a tripping hazard. Myers acknowledges that when the employees moved the ladder to the west side of the tower they placed a piece of wood under one leg of the ladder to brace it because the roof was uneven. Myers contends that there was nothing other than that pice of wood near

13/ In this case, assuming, arguendo, that the distance figures given by the inspector are correct, Myers' ladder had been placed at an angle to the tower of approximately 62 degrees. An exact ratio of one-to-four between the horizontal distance and the length of the ladder constitutes an angle of approximately 75 degrees. We do not find this deviation to be sufficient under the circumstances to justify find that Myers violated the standard.

the base of the ladder and that it cannot properly be found in violation of this standard when it placed material at the base of the ladder for the purpose of stabilizing the ladder. The judge found that there were pieces of angle iron "in the area around" the foot of the ladder and confirmed the citation.

The standard says "Portable ladder feet shall be placed on a substantial base and the area around the top and bottom of the ladder shall be kept clear." The standard clearly intends that the ladder shall be firmly established on a base to prevent slippage or movement of the ladder, and also seeks to prevent tripping hazards that could occur while an employee is ascending or descending the ladder. We do not believe that the purpose of § 1926.450(a)(6) is to prevent the use of a piece of wood to brace and stablize the foot of the ladder. Rather, we find here

that the ladder feet were "placed on a substantial base" and conclude that there was no violation of the standard as to proper bracing and stabilizing.

With respect to a possible tripping hazard, the evidence does not establish that any material other than the wood piece used to stabilize the ladder was placed directly at the foot of the ladder. The inspector's photograph relied on by the judge clearly shows pieces of metal some distance away from the ladder's base. However, the standard requires only that the area around the base of the ladder be kept clear. Thus, the issue before us is whether Myers can be found in violation of this standard merely on the fact that metal objects were located on the roof in the general vicinity of the ladder.

[5] The standard does not define the term "area," nor does it otherwise

indicate the extent of the area the employer is required to keep clear. As we said in discussing the alleged violation of section 1926.450(a)(7), the Commission must rely on objective factors in order to give meaning to a standard that uses imprecise and relative terminology. There is no evidence showing the actual distance between the base of the ladder and the pieces of metal depicted in the photograph. From the photograph, however, it appears that there is a considerable clear area along the roof from the metal objects to the ladder. It is plain from the photograph that these objects are not in a location where they would obstruct an employee in ascending or descending the ladder. Indeed, on the limited record here, there is no apparent relationship between the metal objects and the ladder. Absent any indication to the contrary, we cannot conclude that the standard was

intended to apply in these circumstances. We therefore vacate this citation item.

Accordingly, the citation items alleging violations of 29 C.F.R. §§1926.28(a), 1926.450(a)(6) and 1926.450(a)(7) are vacated.

PUBLISHER'S NOTE:

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING: 77

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309

(404) 881-4197
FTS: 257-4197

SECRETARY OF LABOR, Complainant, v. THE L. E. MYERS CO., HIGH VOLTAGE SYSTEMS DIVISION, Respondent, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 212, Authorized Employee Representative.	OSHRC DOCKET NO. 82-1137

APPEARANCES:

F. Benjamin Riek, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Kent W. Seifried, Esquire, Cincinnati, Ohio, on behalf of respondent

Mr. Walter J. Zimmer, International Brotherhood of Electrical Workers, Local Union No. 212, Cincinnati, Ohio, on behalf of authorized employee representative

DECISION AND ORDER

SALYERS, Judge: Respondent, L. E. Myers Co., is a corporation engaged in the construction of electrical facilities. At the time in question, respondent had been engaged by Emery Industries to place protective rubber hosing over energized electrical lines located at Emery's facilities in St. Bernard, Ohio. While this work was in progress, one of respondent's employees fell from a ladder onto an energized "pothead" and was electrocuted. The

ensuing investigation conducted by the Secretary of Labor led to the issuance of citations charging respondent with violations of the Occupational Safety and Health Act (29 U.S.C. § 651, et seq.).

The serious charges are as follows:

1

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physicial harm to employees in that:

(a) On or about 9/17/82 there were two employees exposed to a potential fall of up to 18' due to overloading of the type 1 Louisville 250 pound capacity fiberglass extension ladder used by these employees to install protective coverings to the 13,000 volt power lines at the southwest corner of building 8D. A feasible and useful method to correct this hazard would be to use one ladder for each employee or (preferred) perform this task from an aerial lift truck.

2

29 CFR 1926.28(a): Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:

(a) On or about 9/17/82 employees working from a Louisville type 1 fiberglass ladder at the southwest corner of building 8D were exposed to a potential fall of up to 75' and were not using safety belts and lanyards or equivalent type fall protection.

3

29 CFR 1926.450(a)(7): Portable ladder(s) were not used at such a pitch that the horizontal distance from the top support to the foot the ladder(s) was about one quarter of the working length of the ladder(s):

(a) On or about 9/17/82 employees were working from a Louisville type 1 fiberglass extension ladder at the southwest corner of the roof of building 8 while the ladder was set at an angle of approximately 62° (18' vertically and up to 9' 8" horizontally).

4

29 CFR 1926.450(a)(10): Portable ladders in use were not tied, blocked, or otherwise secured to prevent their being displaced:

(a) On or about 9/17/82 employees were working from a type 1 Louisville fiberglass extension ladder at the southwest corner of the roof of building 8D while the ladder was not secured from displacement.

The nonserious charge is as follows:

1

29 CFR 1926.450(a)(6): The area(s) around the bottom of portable ladder(s) were not kept clear:

(a) On or about 9/17/82 there were two angle iron racks blocking the bottom of the Louisville type 1 fiberglass extension ladder on which employees were standing. This condition existed on the roof of building 8D at the southwest corner.

THE FACTS

The basic facts are, for the most part, undisputed. In September 1982, the respondent was commissioned to perform certain work for Emery Industries. This included the placing of rubber hosing over electrical lines running between a terminal pole and a tower located on tope of the boiler house building at Emery's facility. The pole was approximately 47 feet high, and the top of the tower was approximately 80 feet above ground level. The distance between these two points was approximately 85 feet with the wires running uphill from the pole to the tower. Although respondent had requested that Emery de-energize the lines while this work was in progress, the request was denied.

The work was to be performed by respon-

dent's foreman, Robert Sayre, an experienced lineman; James Carmac, a journeyman lineman and union steward; and Russell Miller, an apprentice. After unsuccessful attempts to use a 55-foot bucket truck to accomplish the task,[1/] it was finally decided by the foreman, after consultation with respondent's district manager, to use an alternate method. It was decided the work could be done from the tower by covering all electrical equipment with protective rubber blankets and the use of a ladder on the rear of the tower, providing employees safe access to the wires which could then be "rubbered"[2/] by

---

1/ The truck was parked near the wire at the highest reach of the bucket. The employees then applied the hoses and pushed them uphill on the wire towards the tower. Because of the weight of the hoses and friction on the wire, this method had to be abandoned.

2/ The colloquial term for the process of covering the wires with rubber hosing.

sliding the hosing downhill on the wires from the tower to the pole.

On the day of the accident, Sayre, Carmac and Miller began to do the job from the tower. The rubber blankets were placed over all electrical equipment, and employees were wearing protective rubber gloves and sleeves. None of the employees wore safety belts or lanyards on the day of the accident. A fiberglass ladder with a manufacturer's load limit of 250 pounds was placed on the east side of the tower and tied off. The foreman then went up on the ladder and began to place rubber hoses on the east wire. When the weight of the hosing increased on the east wire,[3/] the foreman came down off the ladder, which was then moved to the west side of the

---

3/ The weight on the east and west wires had to be balanced to prevent the pole at the lower level from twisting.

tower. The record is unclear whether the ladder when moved to the west side was again tied off, but the only witness (Carmac)[4/] to appear at the hearing who was present at the time believed it was tied off (Tr. 130). Carmac stablized the ladder by placing a wooden block under one leg to compensate for a slight pitch in the roof.

After the ladder was moved, employee Miller mounted the ladder and climbed to the fifth or sixth rung from the top where he began to "rubber" the wire. Employee Carmac stood on the ladder below Miller handing up the hose sections. Foreman Sayre stood near the ladder on the roof. For reasons unclear in the record, Miller

---

4/ The foreman (Sayre) was disciplined after the accident for his failure to require the use of safety belts on the job and did not return to respondent's employ after his suspension. His whereabouts at the time of the hearing were unknown to both the respondent and the Secretary.

fell forward from the ladder, struck an energized "pothead jumper" some four to six feet below where he had stood on the ladder, and was electrocuted. There was no probative evidence that the ladder collapsed, tipped over, or slid causing Miller to fall to his death.

THE LADDER CHARGE

The Secretary charges respondent with serious violations under the Act's general duty clause for allowing use of the ladder by two employees in circumstances wehre the weight on the ladder allegedly exceeded the load limit specified by the manufacturer. Charges are also leveled under specific standards which relate to ladder pitch and security. Each of these will be discussed separately.

Ladder Collapse

The Secretary charges respondent seriously violated the Act's general duty clause by allowing two employees with a

combined weight in excess of 300 pounds to work from a ladder having a work load capacity of 250 pounds, thereby creating the potential for ladder collapse and possible injuries from falling.

It is undisputed that the ladder bore a sticker indicating a load capacity of 250 pounds, that Miller and Carmac were positioned on the ladder at the same time, and that their combined weight exceeded 300 pounds. Respondent disputes, however, that these circumstances created a hazard.

Respondent urges that the load limit of 250 pounds, as specified on the ladder in question, is not the determining factor for ladder collapse. According to respondent, manufacturers build in a four-to-one safety factor and, when the load limit is specified as 250 pounds, the ladder will actually and safely support up to 1,000 pounds without collapsing. This practice by manufacturers is confirmed in the testi-

mony of the compliance officer (Tr. 281-282) and is not otherwise contradicted in the record.[5/]

Since this charge is lodged under section 5(a)(1) of the Act (the general duty clause), the Secretary has a higher burden of proof than in the regular case. The Secretary must show: (1) the employer filed to render its workplace free of a hazard; (2) the hazard was recognized by the cited employer or the employer's industry in general; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible means by which the employer could have eliminated or materially reduced the

---

5/ The Secretary also argues that two men on the ladder caused another hazard and was a violation of respondent's own work rules. This argument is without merit since the rule in question does not apply to hook ladders which is the type in use at the time.

hazard. Aluminum Company of America (Alcoa), 83 OSAHRC 24/E10, 11 BNA OSHC 1520, 1983 CCH OSHD ¶ 26,526 (No. 78-3157, 1983).

In this case the Secretary has failed to show that the placement of two men on the ladder in question created a hazard of ladder collapse, and this charge will be vacated.[6/]

Ladder Security

The Secretary charges respondent with a violation of 29 C.F.R. §1926.450(a)(10)[7/] for failure to properly secure the ladder in question. The best probative evidence on this point is contained in the testi-

---

6/ Had the violation been charged under section 5(a)(2) of the Act and a specific standard, a different conclusion might be reached.

7/ The standard at 29 C.F.R. § 1926.450 (a)(10) provides:

> (10) Portable ladders in use shall be tied, blocked, or otherwise secured to prevent their being displaced.

mony of employee Carmac who was on the scene at the time of the accident.

It is uncontradicted in the record that the ladder was tied off and secured while employees were working on the east phase of the project. When the ladder was moved to the west phase, it is unclear whether the ladder was tied off. However, the standard speaks in the alternative and does not require the ladder to be tied off if it is "otherwise secured." The burden is on the Secretary to show the ladder in question was not secured or was unstable.

It is undisputed that the ladder in question was in good condition and was a hook ladder (Ex. C-15). This latter fact is significant since, if the hooks were in place at the top and were mounted over a beam on the structure or some other stable support, this would give the ladder considerable security. However, a review of the record, including examination of pictures

taken of the ladder immediately following the accident and on the day of the inspection, neither confirms nor refutes that the hooks were in place on some type of support. This leaves the testimony of employee Carmac as the best evidence relevant to the security of the ladder. Carmac set up the ladder when it was moved to the west phase. He placed a block of wood under one leg of the ladder to brace it from displacement and to compensate for a slight pitch in the roof at that point (Tr. 121). He testified repeatedly on direct examination, on cross-examination, and to questions posed by the Court that the ladder was "secure"[8/] (Tr. 104, 121-124, 131). He went so far as to state he would not have mounted the ladder if he believed it

---

8/ The Secretary argues that this is not what Carmac told the compliance officer during the investigation, but it was his sworn and unequivocating testimony at the hearing.

to be unstable or not secure (Tr. 131). Accordingly, the Secretary has failed to carry the burden of proof and this item will be vacated.

Ladder Pitch

Respondent is charged with a violation of 29 C.F.R. § 1926.450(a)(7)[9/] for failure to assure the ladder was placed at a proper pitch; i.e., four feet vertical for every one foot horizontal. The evidence reflects the top of the ladder was placed against a cross member of the tower 18 feet above the base. The bottom or foot of the ladder was approximately 9 feet 8

9/ The standard at 29 C.F.R. § 1926.450 (a)(7) states:

> (7) Portable ladders shall be used at such a pitch that the horizontal distance from the top support of the foot of the ladder is about one-quarter of the working length of the ladder (the length along the ladder between the foot and the top support). Ladders shall not be used in a horizontal position as platforms, runways, or scaffolds.

inches from the base of the tower on a horizontal plane. Given the fact that the vertical was 18 feet, the standard would require the foot of the ladder to be placed no farther from the base than 4 feet 6 inches. Obviously, respondent's erection of the ladder on the day of the accident did not meet the requirements of this specific standard, and the Secretary has established a violation.[10/]

PROTECTIVE EQUIPMENT CHARGE

The Secretary charges respondent with a serious violation of 29 C.F.R. § 1926.28(a)[11/]

10/ Respondent does not dispute the measurements regarding the height of the ladder or the horizontal distance of the foot from tower base but argues the foot could not be placed within the required distance because of an obstruction on the roof. This argument is rejected since it appears the distance between the obstruction and tower base was in excess of five feet.

11/ The standard at 29 C.F.R. § 1926.28(a) states:

(a) The employer is responsible for requiring the wearing of appropriate

cont'd

for its failure to require the employees at the work site to wear safety belts and lanyards. The record is clear and uncontradicted that none of respondent's employees on the Emery job were wearing this equipment at the time of and prior to the accident. Thus, the Secretary has made a prima facie case in this regard.[12/]

Respondent concedes that the equipment was not in use at the time but asserts this failure was a direct violation of respondent's safety rules, was unknown to respondent, and could not have been rea-

---

11/ cont'd
personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

12/ Respondent renews a defense raised earlier in a motin to dismiss based upon the allegation that his standard was improperly promulgated and, therefore, void and unenforceable. This question was fully addressed in the order denying the motion dated July 28, 1983.

sonably anticipated. Relying upon H. E. Weise, Inc. & Industrial Electrical Construction Co., 82 OSAHRC 18/A2, 10 BNA OSHC 1499, 1982 CCH OSHD ¶ 25,985 (Nos. 78-204 & 78-205, 1982); Capital Electric Line Builders v. Marshall, 678 F.2d 128 (10th Cir. 1982); and Daniel International Corp. v. OSHRC, 683 F.2d 361 (11th Cir. 1982), respondent asserts the defense of "unavoidable employee misconduct." These cases indicate this defense is appropriate if an employer can demonstrate:

1. It has an effective safety program;

2. The program has been communicated to its employees; and

3. The rules are enforced through appropriate supervision and discipline.

Respondent has made an effort to institute and implement a safety program of sorts. It maintains a corporate office for safety headed by a full-time safety director who is assisted in the field by

safety supervisors. At the time of hiring, a new employee is issued a copy of the company's basic safety rules and is made aware of the company's safety manual which is more comprehensive. Thereafter, additional safety materials are from time to time disseminated to employees in the field (Tr. 326). The jobsites are visited on occasion by safety superintendents to insure that the safety rules are followed (Tr. 62-64). Periodic safety meetings are conducted at "tailgate" sessions. When infractions of safety rules occur, respon- dent has on occasion utilized disciplinary action ranging from oral reprimand to suspension.

While this safety program appears on its face to be a workable program, the circumstances surrounding the actions of foreman Sayre on the day of the accident and prior thereto cast serious dout that the program was effective with respect to the crews he supervised.

There is evidence to indicate Sayre did not conduct the required safety "tailgate" meetings and may have falsified reports in this regard (Tr. 430-432). There is no evidence that Sayre received safety instructions of any kind from respondent at any time prior to the accident nor was he instructed by respondent's district manager concerning any potential hazards which might be encountered on the job in question. Even though employee Carmac brought up the qeustion of safety belts prior to commencing the Emery job, he was told by Sayre that belts would not be needed.[13/] This failure by Sayre to require the use of belts indicates a casual indifference to safety on his part and supports a conclusion that respondent's safety

---

13/ Respondent concedes (and every witness that testified on the point verified) that safety belts are standard equipment in this industry and should be used whenever working at elevations.

program was not effectively communicated or enforced. This conclusion is also supported by certain statements made by respondent's district manager in charge of the project following the accident in the presence of an office employee and a union representative to the effect that safety belts were unnecessary and just "get in the way" (Tr. 148, 184).

Respondent has failed to establish its defense of "unavoidable employee misconduct," and the citation will be affirmed.

NONSERIOUS CHARGE

Respondent is charged with a violation of 29 C.F.R. § 1926.450(a)(6)[14/] for failure to keep the area clear at the foot of the ladder to prevent tripping. It is

---

14/ The standard at 29 C.F.R. § 1926.450 (a)(6) provides:

> (6) Portable ladder feet shall be placed on a substantial base, and the area around the top and bottom of the ladder shall be kept clear.

undisputed that two angle iron racks were in the area around the foot of the ladder. This situation is depicted in Complainant's Exhibit 60 and would clearly present a tripping hazard. The citation will be affirmed.

FINDINGS OF FACT

1. Respondent, The L. E. Myers Co., High Voltage Systems Division, is a corporation engaged in the construction of electrical facilities. Respondent has employees who handle or otherwise work on goods that have been moved in commerce.

2. In September 1982, respondent undertook an assignment from Emery Industries to "rubber" energized power lines running between a terminal pole and a tower located on top of the boiler house building at Emery's facility. Three employees were assigned to accomplish this work, and foreman Robert Sayre was in charge. All electrical equipment on the tower was covered

with rubber blankets, and a ladder was placed on the tower to permit the workers access to the power lines.

3. The ladder in use during this process bore a sticker indicating the manufacturer's load limit to be 250 pounds. However, this load limit has a built-in four-to-one safety factor, and the ladder would actually support a load limit of up to 1,000 pounds. Two employees whose combined weight exceeded 300 pounds were positioned on this ladder at the same time. This situation did not create a condition for ladder collapse.

4. The ladder in use on the project was properly secured before use.

5. The top of the ladder was placed against a cross member of the tower 18 feet above the base. The bottom or foot of the ladder was approximately 9 feet 8 inches from the base of the tower on a horizontal plane.

6. The employees using the ladder in the process of rubbering the lines did not wear safety belts and lanyards.

7. For reasons unknown employee Russell Miller, while working on the ladder, fell from the ladder and struck an energized "pothead" causing his death.

8. Two angle iron racks were located in the area around the foot of the ladder causing a tripping hazard.

9. Respondent's safety program was not effectively communicated or enforced.

CONCLUSIONS OF LAW

1. The Occupational Safety and Health Review Commission has jurisdiction of the parties and subject matter in this case.

2. Use of the ladder in question by two employees did not create a hazard of ladder collapse, and respondent has not violated section 5(a)(1) of the Act.

3. The ladder in use at the time of the accident was properly secured within

the meaning of 29 C.F.R. § 1926.450(a)(10), and respondent did not violate this standard.

4. The ladder in question was placed against a cross member of the tower 18 feet above the base. The foot of the ladder was approximately 9 feet 8 inches from the base of the tower on a horizontal plane. This circumstance caused a violation of 29 C.F.R. § 1926.450(a)(7).

5. Respondent's employees at the time of the accident and prior thereto were not wearing safety belts and lanyards contrary to 29 C.F.R. § 1926.28(a).

6. The area at the base of the ladder during the time in question was not kept clear to avoid tripping hazards contrary to 29 C.F.R. § 1926.450(a)(6).

ORDER

It is hereby ORDERED:

1. Serious Citation No. 1, item 1, is vacated.

2. Serious Citation No. 1, item 2, is affirmed and a penalty of $720.00 is assessed.

3. Serious Citation No. 1, item 3, is affirmed and a penalty of $540.00 is assessed.

4. Serious Citation No. 1, item 4, is vacated.

5. "Other" than serious Citation No. 2, item 1, is affirmed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-3215

WILLIAM E. BROCK, Secretary of Labor,

Petitioner,

-v-

THE L. E. MYERS COMPANY, HIGH VOLTAGE DIVISION, and OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Decided and Filed May 13, 1987

Before: ENGLE and GUY, Circuit Judges; and PECK, Senior Circuit Judge.

J U D G M E N T

ON PETITION TO REVIEW a decision of the Occupational Safety and Health Review Commission.

THIS CAUSE came on to be heard on the transcript of record from the said agency and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the decision of the said agency in this cause be and the same is hereby reversed, the petition to review is granted.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

_____

CLERK

Issued as Mandate: June 8, 1987

COSTS: None
Filing fee... $
Printing.....$
Total.....$

Attest:

_____

Deputy Clerk

29 U.S.C. § 654. Duties of employers and employees

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter. . . .

29 U.S.C. § 666. Civil and criminal penalties

* * *

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to this sectin 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $1,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirement of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be

assessed a civil penalty of up to $1,000 for each such violation.

* * *

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which woiuld have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violations.

29 C.F.R. § 1926.28 Personal protective equipment

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees. . . .

29 C.F.R. § 1926.105 Safety nets

(a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical. . . .

29 C.F.R. § 2200.73 (1983) Burden of proof

(a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Secretary.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix was sent by First Class Mail, postage prepaid, this 11th day of August, 1987 to:

Sandra Lord
Assistant Counsel
U. S. Department of Labor
S-4004
Washington, D.C. 20210

Ray H. Darling, Jr.
Executive Secretary
OSHRC
1825 K. Street, N.W.

Walter Zimmer, Business Mgr.
IBEW, Local 212
1216 E. McMillan Street
Cincinnati, Ohio 45206

Solicitor General
Department of Justice
Washington, D.C. 20530

Gary E. Becker

(3)

No. 87-246

Supreme Court, U.S.
FILED
NOV 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

L.E. MYERS COMPANY, PETITIONER

v.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor
for Special Appellate and
Supreme Court Litigation

STEVEN J. MANDEL
Counsel for Appellate Litigation

JEFFREY A. HENNEMUTH
Attorney
Department of Labor
Washington, D.C. 20210

18 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly allocated the burden of persuasion in an enforcement action under the Occupational Safety and Health Act, where the issue was whether the violation of a mandatory occupational safety standard was the result of employee misconduct that was not foreseeable through the exercise of reasonable diligence.

2. Whether the court of appeals correctly held that the mandatory occupational safety standard set forth at 29 C.F.R 1926.105(a) "indicates" the need for employees to wear safety belts when working more than 25 feet above the ground, for purposes of establishing a violation of the general construction industry personal protective equipment standard, 29 C.F.R. 1926.28(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Austin Building Co. v. *OSHRC*, 647 F.2d 1063 (10th Cir. 1981) 9
Brennan v. *OSHRC (Alsea Lumber Co.)*, 511 F.2d 1139 (9th Cir. 1975) 5, 7, 8
Brennan v. *Southern Contractors Service*, 492 F.2d 498 (5th Cir. 1974) 14
Brock v. *L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985) 14
Capital Electric Line Builders, Inc. v. *Marshall*, 678 F.2d 128 (10th Cir. 1982) 7, 8, 9
Danco Construction Co. v. *OSHRC*, 586 F.2d 1243 (8th Cir. 1978) 8, 9
Daniel International Corp. v. *OSHRC*, 683 F.2d 361 (11th Cir. 1982) 7, 8
Forging Industry Ass'n v. *Secretary of Labor*, 773 F.2d 1436 (1985) 9
General Dynamics Corp. v. *OSHRC*, 599 F.2d 453 (1st Cir. 1979) 8
H.B. Zachry Co. v. *OSHRC*, 638 F.2d 812 (5th Cir. 1981) 7, 8
Mountain States Telephone & Telegraph Co. v. *OSHRC*, 623 F.2d 155 (10th Cir. 1980) 7, 8, 9
National Industrial Constructor, Inc., 1981 O.S.H. Dec. (CCH) ¶ 25,404 (1981) 14
Ocean Electric Corp., 1975-1976 O.S.H. Dec. (CCH) ¶ 20,167 (1975) 9
Ocean Electric Corp. v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979) 7, 9
Pennsylvania Power & Light Co., 1983-1984 O.S.H. Dec. (CCH) ¶ 26,518 (1983) 9

Cases—Continued: Page

Pennsylvania Power & Light Co. v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984) 7, 8, 13
Sierra Construction Corp., 1978 O.S.H. Dec. (CCH) ¶ 22,506 (1978) 14
Southern Colorado Prestress Co. v. *OSHRC*, 586 F.2d 1342 (10th Cir. 1978) 14

Statutes and regulations:

Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.*:
§ 5a, 29 U.S.C. 654(a) 10
§ 17(k), 29 U.S.C. 666(k) 3, 6, 10

29 C.F.R.:
Pt. 1926 3
Section 1926.26 13
Section 1926.28(a) 3, 4, 5, 6, 13
Section 1926.105(a) 4, 5, 14
Section 1926.201(a) 13
Section 1926.751 13

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-246

L.E. MYERS COMPANY, PETITIONER

v.

DENNIS E. WHITFIELD, DEPUTY SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 818 F.2d 1270. The decision of the Occupational Safety and Health Review Commission (Pet. App. 32-76) is reported at 12 O.S.H. Cas. (BNA) 1609 and 1986-1987 O.S.H. Dec. (CCH) ¶ 27,476 (1986). The decision and order of the administrative law judge (Pet. App. 78-104) is unreported, but is summarized at [1984-1985] O.S.H. Dec. (CCH) ¶ 26,932.

JURISDICTION

The judgment of the court of appeals (Pet. App. 105-106) was entered on May 13, 1987. The petition for a writ of certiorari was filed on August 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that constructs and installs electrical transmission and distribution equipment (Pet. App. 4). In September 1982, a fatal accident occurred at a construction project near Cincinnati, Ohio, where petitioner was installing electrical insulation over high-voltage power lines running between a 47-foot terminal pole and an 80-foot tower located atop a boiler house (*id.* at 4-5). The installation work was being performed by a company foreman and two linemen who climbed a ladder placed against the tower and slid the insulation hose down onto the energized wires (*id.* at 5-6). The linemen specifically were told by the foreman that they need not bring safety belts to the job and so wore no protective equipment other than rubber gloves and sleeves (*id.* at 6, 8). Shortly after one of the linemen, an apprentice, mounted the ladder and began to work, he unexpectedly fell forward from the ladder and struck an exposed terminus on the power line (*id.* at 7-8). The apprentice was instantly electrocuted, and the other lineman, who was standing on a lower rung of the ladder, fell backward onto the roof, suffering broken ribs and other injuries. The foreman, who had been observing from a corner of the roof, was unharmed (*id.* at 8-9).

Following the accident, an investigation was conducted by a compliance officer of the Occupational Safety and Health Administration (OSHA). OSHA issued several citations against petitioner for serious and non-serious violations of OSHA mandatory safety standards.[1] Pet.

[1] A "serious" violation occurs "in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation" (§ 17(k), 29 U.S.C. 666(k)). The statute defines only serious violations, creating by implication a residual category of "other than serious" violations.

App. 2. Among these was a citation for a serious violation of 29 C.F.R 1926.28(a), the general personal protective equipment standard for the construction industry, based on the failure of petitioner's employees to use safety belts while exposed to a potential fall of 75 feet (Pet. App. 3-4).[2]

2. a. At a hearing before an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission (OSHRC), petitioner "concede[d] that the [safety] equipment was not in use at the time but assert[ed] this failure was a direct violation of [petitioner's] safety rules, was unknown to [petitioner] and could not have been reasonably anticipated" (Pet. App. 95-96). The ALJ understood this argument as "the defense of 'unavoidable employee misconduct' " (*id.* at 96).[3] Accordingly, the hearing focused on the nature and implementation of petitioner's safety effort (*id.* at 10).

Evidence adduced at the hearing "revealed a safety program at Myers which looked good on paper but was routinely disregarded in practice in the Cincinnati district" (Pet. App. 10). The formal program required safety manuals for both supervisory and non-supervisory

[2] 29 C.F.R 1926.28(a) provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part [29 C.F.R. Pt. 1926—Safety and Health Regulations for Construction] indicates the need for using such equipment to reduce the hazards to the employees.

[3] The ALJ held that such a defense requires the employer to demonstrate (1) the existence of an effective safety program, (2) communication of that program to the employees, and (3) enforcement of safety rules through appropriate supervision and discipline (Pet. App. 96).

employees, regular safety meetings between foremen and workers at the worksite, individual pre-job discussions of safety matters, reports on safety meetings to the company's safety supervisor, and a progressive system of discipline for safety infractions (*id.* at 10-11). At the hearing, however, various supervisors and employees testified that such meetings rarely if ever occurred and reports were only sporadically filed (*id.* at 10-12, 98). No evidence was produced that the workers involved in this accident ever received safety manuals or attended safety meetings, and it was conceded that there had been no specific discussion of safety matters before this job began (*id.* at 10-12). Indeed, not only did the foreman here instruct the linemen not to wear belts and neglect to wear one himself, but the company's district manager was reputed to have said that "good" linemen did not need safety belts because they just "get in the way" (*id.* at 13-14, 99).

The ALJ found that the evidence at the hearing "support[ed] a conclusion that [petitioner's] safety program was not effectively communicated or enforced" (Pet. App. 98-99). Accordingly, the ALJ concluded that petitioner "ha[d] failed to establish its defense of 'unavoidable employee misconduct' " and affirmed the citation (*id.* at 99). Since evidence of the failure of petitioner's employees to wear safety belts at the time of the accident was clear and undisputed, the ALJ affirmed the citation and assessed a civil penalty of $720.00 (*id.* at 95, 99, 104).

b. The OSHRC, on review, vacated the citation (Pet. App. 14-15, 63-67). Pursuant to 29 C.F.R. 1926.28(a), the Commission found that the Secretary of Labor had proved (i) the existence of a fall hazard warranting the use of safety belts, and (ii) that the mandatory safety standard set forth at 29 C.F.R. 1926.105(a) "indicates" the need for safety belts where the workplace is more than 25 feet

above the ground.[4] The Commission then focused on what it regarded as the third element of the violation under 29 C.F.R. 1926.28(a): "the Secretary must prove that the employer failed to 'requir[e] the wearing of' the prescribed safety equipment" (Pet. App. 63). After reviewing the evidence on petitioner's safety program and its implementation, the OSHRC found that petitioner "did require its employees to use safety belts" (*id.* at 64). The Commission believed that the Secretary had to show that petitioner " 'caused, or at least knowingly acquiesced in [the] violation' " (*id.* at 67, quoting *Brennan* v. *OSHRC*, 511 F.2d 1139, 1144 (9th Cir. 1975)) and determined that "the Secretary did not make such a showing" (Pet. App. 67). Accordingly, the Commission vacated the citation.

3. The Sixth Circuit reversed the Commission, explaining at the outset of its opinion that it agreed with the Secretary's contention that "the Commission's decision is not supported by substantial evidence and did not adequately articulate its reasons for failing to credit the findings of the ALJ" (Pet. App. 2). The court went on to respond "seriatim" (*id.* at 16) to the two arguments raised by the Secretary on appeal—improper allocation of burden of proof and the absence of substantial evidence to support the Commission's decision.

Addressing first the burden of proof issue (Pet. App. 16-29) the court discussed the divided circuit court precedent on the question whether "the Secretary carries the burden of proving the insufficiency of that [safety] program" (*id.* at 21, 22-24). It concluded that the proper rule "is to regard a claim of unfor[e]seeable employee misconduct as an affirmative defense to be proved by the employer after the Secretary has made out a *prima facie*

---

[4] 29 C.F.R. 1926.105(a) provides:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

case of a violation of the Act" (*id.* at 24-25 (~~emphasis~~ Italics in original)).[5] The court stated that the Secretary must first establish a prima facie case of the employer's awareness of a "potentially preventable hazard" by, for example, showing "the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions" (*id.* at 22-25, 27). An employer wishing to defend against a citation on grounds of employee misconduct, according to the Sixth Circuit, must then bear the burden of demonstrating by a preponderance of the evidence that it has an adequate and thorough safety program that is communicated to employees and enforced in practice (*id.* at 28).

In a separate section dealing with the Secretary's substantiality of the evidence argument (Pet. App. 29-31), the court of appeals went on to find that "the Commission chose to accept [petitioner]'s evidence as to the adequacy of its written safety program while selectively ignoring testimony, credited by the ALJ, which showed that the program *in practice* * * * was not only ignored, but actively disregarded" (Pet. App. 30 (footnote omitted; emphasis in original)). Because "[t]he Commission gave no reasons for its failure to accept the factual findings [of] the ALJ" (*ibid.*), the court of appeals stated that the OSHRC's conclusion was not "supported by substantial evidence and it will therefore be reversed" (*id.* at 30-31).

ARGUMENT

Petitioner challenges the conclusion of the Sixth Circuit that the employer bears the burden of proving that the

[5] The Sixth Circuit treated "unforeseeable employee misconduct" (Pet. App. 24-25) as a generic issue under the Occupational Safety and Health (OSH) Act. It did not refer specifically to Section 17(k)'s definition of a serious violation nor did it analyze the text of 29 C.F.R. 1926.28(a), the regulation petitioner was found to have violated.

violation of a mandatory safety standard was the result of unforeseeable employee misconduct. We agree that there is a significant and continuing conflict on this burden of proof issue among the courts of appeals, and that the issue may well require resolution by this Court. This case, however, does not appear to be an appropriate vehicle for consideration of this question. While the matter is not free from doubt, we do not believe that the issue on which the lower courts are divided is actually dispositive here. We therefore believe that certiorari should be denied.[6]

1. As petitioner and the Sixth Circuit accurately observe (Pet. 13-20; Pet. App. 22-23), the courts of appeals have adopted a variety of inconsistent positions on the issue of whether, and to what extent, an employer bears an evidentiary burden when the issue of employee misconduct arises in an OSHA enforcement proceeding. Four circuits have taken the position that the Secretary, in seeking to establish a violation of an OSHA standard, has the burden of persuasion to show that any employee misconduct giving rise to the violation was reasonably foreseeable.[7] Five circuits, including the court of appeals in this case, have taken contrary positions, holding that unforeseeable employee misconduct is essentially an affirmative defense on which the cited employer must bear the burden of persuasion.[8]

[6] Question 2, concerning the interpretation of a particular OSHA regulation, presents no conflict in the circuits and plainly does not merit this Court's attention.

[7] See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984); *Capital Electric Line Builders, Inc.* v. *Marshall*, 678 F.2d 128 (10th Cir. 1982); *Mountain States Telephone & Telegraph Co.* v. *OSHRC*, 623 F.2d 155 (10th Cir. 1980); *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F.2d 396 (4th Cir. 1979); *Brennan* v. *OSHRC*, (*Alsea Lumber Co.*), 511 F.2d 1139 (9th Cir. 1975).

[8] See *Daniel International Corp.* v. *OSHRC*, 683 F.2d 361 (11th Cir. 1982); *H.B. Zachry Co.* v. *OSHRC*, 638 F.2d 812 (5th Cir. 1981);

Further variations exist among the courts within each of these groupings. With respect to those placing the burden on the Secretary, the Tenth Circuit's decisions in *Mountain States Telephone & Telegraph Co.* v. *OSHRC*, 623 F.2d 155 (1980), and *Capital Electric Line Builders, Inc.* v. *Marshall*, 678 F.2d 128 (1982), appear to impose upon the Secretary the sole burden of producing evidence on the issue of employee misconduct, while the Third and Ninth Circuits would require the employer to bear the burden of producing rebuttal evidence (though *not* the burden of persuasion) where the Secretary has made a prima facie showing of the foreseeability of the violation. See *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F.2d 350 (3d Cir. 1984) (burden of persuasion does not shift to the employer, at least where the inference of employer knowledge is raised only by the Secretary's proof of a supervisor's misconduct); *Brennan* v. *OSHRC (Alsea Lumber)*, 511 F.2d 1139 (9th Cir. 1975).

Among those circuits placing the burden on the employer, the First, Fifth and Eleventh Circuits require employers to prove that the employee's actions were an unforeseeable departure from the employer's uniformly and effectively enforced work rules, and make no mention of any related evidentiary burden on the Secretary. See *Daniel International Corp.* v. *OSHRC*, 683 F.2d 361, 364 (11th Cir. 1982) (employee misconduct an "affirmative defense"); *H.B. Zachry Co.* v. *OSHRC*, 638 F.2d 812 (5th Cir. 1981); *General Dynamics Corp.* v. *OSHRC*, 599 F.2d 453 (1st Cir. 1979). The Eighth and (in this case) Sixth Circuits, by contrast, appear to require the Secretary to establish a prima facie case of employer knowledge of the violation before the burden of persuasion on the unforeseeability of the employee conduct shifts to the

---

General Dynamics Corp. v. *OSHRC*, 599 F.2d 453 (1st Cir. 1979); *Danco Construction Co.* v. *OSHRC*, 586 F.2d 1243 (8th Cir. 1978).

employer. See *Danco Construction Co.* v. *OSHRC*, 586 F.2d 1243 (8th Cir. 1978).[9]

Employee misconduct is commonly alleged in response to OSHA citations, and cases in which the facts are close, including those in which the record is unclear, often will turn on the burden of persuasion. Uncertainty among the circuits, and confusion in the OSHRC's own decisions,[10] leaves participants without clear guidance on the way in which proceedings, evidence and pleadings are to be structured. Moreover, there does not, at present, appear to be any clear trend nor any basis for harmonizing the differences among the circuits in placing the burden of proof on the issue of foreseeability of employee misconduct.

Moreover, the proper allocation of the burden of proof on employee misconduct is an important part of the OSH Act's substa· ·ve scheme. Unforeseeable employee mis-

---

[9] The picture is further confused by internal disharmony in the language used in the opinions in two circuits. The Tenth Circuit's observation, in *Austin Building Co.* v. *OSHRC*, 647 F.2d 1063, 1068 (1981), that an employer cited for an OSHA violation "may defend by showing that the violation was an unforeseeable occurrence," seems not to reflect the position, implied in *Capital Electric* and *Mountain States*, that an employer has no evidentiary burden on that issue. Similarly, the holding of a Fourth Circuit panel in *Ocean Electric* that the Secretary retains the burden of proof in employee misconduct cases may be undercut by a later dictum by the full court stating that "the employer has available the *defense* of 'unforeseeable employee misconduct.' " *Forging Industry Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1450 (1985) (en banc) (emphasis added).

[10] Compare, *e.g.*, the OSHRC decision in this case (burden of proof placed solely on the Secretary), with *Pennsylvania Power & Light Co.*, 1983-1984 O.S.H. Dec. (CCH) ¶ 26,518 (1983) (after the Secretary establishes a prima facie case of employer knowledge, the burden shifts to the employer to prove "that it had done everything reasonably possible to avoid a violation"), and with *Ocean Electric Corp.*, 1975-1976 O.S.H. Dec. (CCH) ¶ 20,167 (1975) (employer bears the burden of proving unforeseeability of the employee's unsafe conduct).

conduct should be treated as an affirmative defense,[11] not only because it appears in Section 17(k) as an exception to the definition of a serious violation but also because that allocation of the burden of persuasion is an integral part of the OSH Act's over-all program (29 U.S.C. 666(k)). The Act operates by placing responsibilities on employers, who bear the twin burdens of a general duty to furnish a workplace free of recognized hazards and a specific duty to observe mandatory standards promulgated by the Secretary (29 U.S.C. 654(a)). The Act places obligations on employers because of the underlying presumption that, absent unusual events, the employer is in command of the workplace. If the employer is presumed to be in command of the workplace, then as an evidentiary matter the burden properly rests on the employer to show that in a particular case a violation was the result of unforeseeable departures from its well enforced safety program. Accordingly, for reasons of legal clarity and substantive OSH Act policy, this question appears to be one meriting this Court's attention.

2. The more difficult question is whether the outcome of this case turns on the resolution of the conflict on that issue. Although the matter is not free from doubt, we believe that the result in this case would be the same no matter who bears the burden of persuasion. It does not appear that the Sixth Circuit would have decided the case differently under a different view of the burden, nor are any

[11] Because we believe that unforeseeable employee misconduct is properly an affirmative defense, we disagree with the Sixth Circuit here to the extent that the court imposed on the Secretary the burden of establishing a prima facie case of employer knowledge by presenting evidence showing "the employer's failure to provide adequate safety equipment or to properly instruct its employees on necessary safety precautions" (Pet. App. 27 (citations omitted)).

further proceedings in this case called for that would be affected by the resolution of the conflict.

a. In this case, the ALJ found that the employer had "failed to establish its defense of 'unavoidable employee misconduct' " (Pet. App. 99) largely because the evidence indicated that "[petitioner's] safety program was not effectively communicated or enforced" (*id.* at 102). The OSHRC, to the contrary, found "no evidence in the record" indicating that the employee misconduct here "was reasonably foreseeable to or preventable" by petitioner (*id.* at 65-66). The court of appeals, in turn, held the Commission's failure to accept the ALJ's factual findings to be unsupported by any stated reasons or by substantial evidence in the record, and on that account reversed (*id.* at 30-31).

The court of appeals appears to have endorsed the factual findings of the ALJ—most relevantly those pertaining to the foreseeability or preventability of employee misconduct—and rejected the OSHRC's reformulation of them. The burden of proof issue would be determinative only where the evidence is in equipoise. As the ALJ's opinion shows, however, the evidence that petitioner did not enforce its safety rules on this case is extremely strong (Pet. App. 97-99). Moreover, the court's opinion does not suggest in any way that it viewed the question as a close one. Nor does the court purport to rely on its burden of proof analysis as being in any way dispositive of the outcome. We thus believe that that analysis is, in fact, dictum, and its elimination or alteration would not alter the outcome of the case.

With due caution, however, we must note that this conclusion is not unassailable. Strictly speaking, the opinion states that the OSHRC's conclusion was not supported by substantial evidence, not that the contrary conclusion was correct. Moreover, the court of appeals characterized the OSHRC's conclusion two different ways, once as a simple

factual finding (Pet. App. 14-15) and once as a finding explicitly tied to the issue raised in this petition: "[t]he Commission concluded that the Secretary failed to sustain his burden of proving a violation of § 1926.28(a)" (*id.* at 15). It is thus conceivable that the Sixth Circuit thought the factual question close enough to be affected by its placing of the burden of persuasion on the employer.

b. The court of appeals' burden of persuasion analysis is also integral to its holding if it is contemplated that the case is to be remanded to the OSHRC for further proceedings concerning whether the citation is to be upheld.[12] In our view, however, the court of appeals' judgment concludes the issue of the citation's validity and that court did not intend for the case to be returned to the OSHRC, save possibly for an order imposing a civil penalty and setting an abatement date.

Neither the opinion nor the judgment of the court of appeals indicated that the case was to be remanded, and there is nothing in the circumstances surrounding the case to suggest that the court nonetheless intended further proceedings on the matter. The ALJ, in his report to the OSHRC, "affirmed" the citation ("Serious Citation No. 1, item 2") and assessed a penalty of $720.00 (Pet. App. 104). The OSHRC "vacated" the citation (*id.* at 76, 67). The court of appeals' judgment provided that "the decision of [the OSHRC] in this cause be and the same is hereby reversed" (*id.* at 106; see also *id.* at 31). The reversal of that decision would appear to adopt the position recommended in the ALJ's report, which was to affirm the citation. Thus, it appears that the Sixth Circuit's judgment

[12] If the case must return to the OSHRC for a re-weighing of the evidence under the correct standard, it is still possible that the burden would not matter. The Commission might find, and the court of appeals might agree, that the evidence is clear. Thus, this Court might want to decline to grant review on an issue that might or might not ultimately decide the case.

leaves no room for further inquiry by the OSHRC into the validity of the citation and hence presents no occasion for future application in this case of that court's burden of persuasion analysis.[13]

We are frank to say, however, that this conclusion also is not free from doubt. The court of appeals' discussion of burden of proof, while not long, occupies a major portion of its opinion. Moreover, it is written in a manner to serve as a useful guide for proper proceedings on remand, and its presence is difficult to account for if, as we believe, it is dicta. More generally, it is frequent practice to remand to an adjudicatory body for further proceedings after its reasoning is found wanting in some respect.

c. In summary, we believe this case is not certworthy because it is far from clear that the important burden of proof issue discussed in the court of appeals' opinion plays any part in the disposition of the case. Should the Court disagree on that point and find it clear that the question needs to be addressed, we suggest that it would be appropriate to grant the petition with respect to the burden of proof issue.[14]

[13] The court of appeals here nowhere mentioned a remand. There is precedent for a court's reversing the OSHRC's decision on an issue without remanding to the agency on that question (*Pennsylvania Power & Light* v. *OSHRC*, 737 F. 2d at 358).

[14] The language of 29 C.F.R. 1926.28(a), making the employer "responsible for requiring" the use of appropriate protective equipment, might pose a further obstacle to review by this Court, were it read simply to demand the formulation of certain rules by the employer. While this language does differ from some other OSHA standards which simply demand that certain safety requirements be met (see, *e.g.*, 29 C.F.R. 1926.26 (illumination at construction cites), 1926.105 ("safety nets shall be provided * * *"), 1926.201(a) (signaling by flagmen), 1926.751 (structural steel assembly)), we are aware of no instance in which it has been construed only to require the promulgation of rules by the employer. More specifically, petitioner has not made that argument in this case and does not do so now.

3. We oppose the petition for a writ of certiorari on the question whether 29 C.F.R 1926.105(a) "indicates" that safety belts are needed for workers at elevations more than 25 feet above the ground. The Sixth Circuit's affirmance of the OSHRC's holding on this point is correct and does not conflict with a decision of any other circuit, and is congruent with appellate and Commission precedent interpreting Section 1926.105(a) to require use of safety belts whenever such belts would provide effective fall protection. See *Brock* v. *L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985); *Southern Colorado Prestress Co.* v. *OSHRC*, 586 F.2d 1342 (10th Cir. 1978); *Brennan* v. *Southern Contractors Service*, 492 F.2d 498 (5th Cir. 1974); *National Industrial Constructor, Inc.*, 1981 O.S.H. Dec. (CCH) ¶ 25,404 (1981); *Sierra Construction Corp.*, 1978 O.S.H. Dec. (CCH) ¶ 22,506 (1978). The issue accordingly does not warrant the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor
for Special Appellate and
Supreme Court Litigation

STEVEN J. MANDEL
Counsel for Appellate Litigation

JEFFREY A. HENNEMUTH
Attorney
Department of Labor

NOVEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60108

SUPREME COURT OF THE UNITED STATES

L. E. MYERS COMPANY, HIGH VOLTAGE DIVISION, ET AL. *v.* SECRETARY OF LABOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-246. Decided December 14, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

The issue in this case is upon which party in an Occupational Safety and Health Administration (OSHA) enforcement action does the burden of proving that a workplace accident was the result of unforeseeable employee misconduct fall. The Court of Appeals for the Sixth Circuit held that the issue of unforeseeable employee misconduct is an affirmative defense: once the Government establishes a prima facie case of an employer's failure to implement an effective safety program, then the employer has the burden of proving that the violation was caused by unforeseeable employee misconduct rather than inadequacies in the enforcement of its safety program. *Brock* v. *L. E. Myers Co., High Voltage Div.*, 818 F. 2d 1270 (CA6 1987). In so holding, the court agreed with the position of the Eighth Circuit, *Danco Construction Co.* v. *OSHRC*, 586 F. 2d 1243 (CA8 1978), but reinforced the already confusing patchwork of conflicting approaches to this issue. In contrast to this position, some Circuits have held that the employer bears the burden of proving that it has implemented workplace safety rules that are effectively enforced, without imposing an initial evidentiary burden on the Government with respect to this defense. *H. B. Zachry Co.* v. *OSHRC*, 638 F. 2d 812 (CA5 1981); *General Dynamics Corp., Quincy Shipbuilding Div.* v. *OSHRC*, 599 F. 2d 453 (CA1 1979). Other Courts of Appeals place upon the Gov-

ernment the burden of proving that the accident was not the result of unforeseeable employee misconduct. *Pennsylvania Power & Light Co.* v. *OSHRC*, 737 F. 2d 350 (CA3 1984); *Capital Electric Line Builders of Kansas, Inc.* v. *Marshall*, 678 F. 2d 128 (CA10 1982); *Ocean Electric Corp.* v. *Secretary of Labor*, 594 F. 2d 396 (CA4 1979); *Brennan* v. *OSHRC*, 511 F. 2d 1139 (CA9 1975). This conflict amongst the Circuits shows no signs of abating and the issue is central to OSHA's enforcement efforts; accordingly, I would grant certiorari.